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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UNUM LIFE INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

JOHN E. WARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE AMERICAN COUNCIL OF LIFE INSURANCE, THE HEALTH INSURANCE ASSOCIATION OF AMERICA AND STANDARD INSURANCE COMPANY IN SUPPORT OF PETITIONER

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BRIEF AMICI CURIAE OF THE AMERICAN COUNCIL OF LIFE INSURANCE, THE HEALTH INSURANCE ASSOCIATION OF AMERICA AND STANDARD INSURANCE COMPANY IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

The American Council of Life Insurance represents more than 500 member life insurance companies that together underwrite the vast majority of disability and life insurance in the United States. The Health Insurance Association of America is an advocate for the private market-based health insurance system, representing more than 200 members which provide medical expense and supplemental insurance, as well as long-term care insurance and disability income protection, to more than 110 million Americans. These *amici's* members include major providers of disability, health, life and other group insurance to employee benefit plans subject to the Employee Retirement Income Security Act of 1974 ("ERISA"). Standard Insurance Company is one of the nation's largest providers of group long-term disability and retirement insurance, with over 60,000 group clients representing more than 4 million individual participants in many different states.

This case presents questions of vital interest to *amici* and their members regarding the scope of ERISA's preemption of state law. The decision below applies state common law rules to claims for benefits under ERISA-covered employee benefit plans. Many of the plans served by *amici*'s members operate on a multistate or even nationwide basis. Unless the

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[1] Pursuant to Rule 37.6, *amici curiae* state that this brief was not authored, in whole or in part, by counsel to a party and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than the *amici curiae* or their counsel. This brief is filed with the consent of the parties. Their letters of consent have been filed with the Clerk of the Court.

decision below is reversed, the cost and complexity of claims administration in these plans will increase, and the Congressional intent to create through ERISA uniform federal regulation of employee benefit plans will be thwarted.

SUMMARY OF ARGUMENT

Section 514 of ERISA, 29 U.S.C. § 1144, preempts all state laws that "relate to" ERISA-covered employee benefit plans but saves from that preemption laws which regulate insurance. The decision of the court of appeals in this case permits a participant in an ERISA-covered employee benefit plan to avoid the plan's claim filing deadline through application of two California common law rules. First, it holds that California's notice-prejudice rule, under which late claim filing is excused unless the insurer providing benefits is prejudiced by the late filing, is saved from preemption as a law which regulates insurance. Second, it holds that California's *Elfstrom* rule of agency, under which the employer sponsoring the ERISA plan is treated as the agent of the insurer for purposes of receiving notice of claims for plan benefits, does not relate to the plan.

In applying these California rules to a benefit claim under an ERISA plan, the court of appeals wrongly chopped ERISA preemption from both ends. State law rules that are directly applied to claims for ERISA-covered benefits necessarily relate to the ERISA plan that provides those benefits. Contrary to the court of appeals' rationale, Congress did not intend that ERISA and state law jointly regulate employee benefit plans. Rather, ERISA's preemption provision was designed to preserve uniform federal

regulation, to the exclusion of state law. Moreover, application of a state law rule that treats the employer as the agent of an insurer because of the employer's fiduciary and other duties under ERISA clearly intrudes on a regulatory field occupied by ERISA.

The court of appeals also erred in holding that the notice-prejudice rule was saved from preemption as a law which regulates insurance. This Court has previously established that whether a state law regulates insurance depends on a common-sense view of insurance regulation and factors developed to identify the business of insurance under the McCarran-Ferguson Act. The California common law rules at issue here are analytically indistinguishable from the Mississippi common law causes of action that this Court held were not saved as laws regulating insurance in *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987). Because these rules derive from general common law principles, they fail a common-sense view of insurance regulation and the third McCarran-Ferguson factor. Since they do not spread insurance risk, as the court of appeals conceded as to the notice-prejudice rule, and do not affect integral terms of the policy, they also fail the other McCarran-Ferguson factors. Accordingly, they are not saved from preemption, and the court of appeals erred in holding to the contrary.

ARGUMENT

I. THE APPLICATION OF STATE LAW RULES TO A CLAIM FOR BENEFITS UNDER AN ERISA PLAN "RELATES TO" THAT PLAN FOR PREEMPTION PURPOSES

The court of appeals in this case applied two state law rules to determine whether a benefit claim was timely filed under an ERISA-covered employee benefit plan. First, following its earlier decision in *Cisneros v. UNUM Life Insurance Co. of America*, 134 F.3d 939 (9th Cir. 1998), the court held that the filing of a claim after the expiration of the plan's filing deadline could be excused under California's "notice-prejudice" rule if the insurer providing the benefits was not prejudiced by the late filing. (App. 5a-6a.) Second, the court applied California's *Elfstrom* rule, under which the employer sponsoring the plan is treated as the agent of the insurer so that timely notice of the claim to the employer excuses the late filing with the insurer. (App. 9a-11a.) Since application of state law rules to a claim for benefits under an ERISA plan is precluded by ERISA's express preemption provision, § 514, 29 U.S.C. § 1144, the court of appeals erred, and its judgment should be reversed.

The threshold preemption inquiry is whether a state law "relates to" an ERISA plan within the meaning of § 514(a).[2]

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[2] Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b).

The court of appeals did not address whether application of the notice-prejudice rule related to an ERISA plan. It did, however, conclude that application of the *Elfstrom* rule to the plan did not "relate to" the plan. (App. 21a-22a.) Under this Court's prior decisions, however, both rules relate to the plan since they directly affect a claim for plan benefits.

In its pre-ERISA decision in *Elfstrom v. New York Life Insurance Co.*, 432 P.2d 731 (Cal. 1967), the California Supreme Court held that an employer that participates in the administration of a group insurance policy which provides benefits to employees becomes an agent of the insurer. In applying the *Elfstrom* rule of agency to this case, the court of appeals quoted extensively and with approval from *Turrill v. Life Insurance Co. of North America*, 753 F.2d 1322 (5th Cir. 1985). (App. 16a-18a.) *Turrill* followed *Elfstrom* to hold that a late claim under a disability insurance policy (which, as in this case, provided benefits under an ERISA-covered employee benefit plan) was not untimely if the employer that sponsored the plan received timely notice. *Id.* at 1324. In holding that the employer could be the agent of the insurer for purposes of notice of claims, the *Turrill* court relied heavily on ERISA's imposition of fiduciary duties on the employer with regard to the employee benefit plan, concluding that "proof of an employer's ERISA-based reporting and fiduciary responsibilities with respect to a group insurance policy in itself raises an issue" regarding "the existence of an agency relationship between the employer and group insurer." *Id.* at 1325.

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29 U.S.C. § 1144(a).

After discussing *Turrill*, the court of appeals applied its rationale to the facts of this case:

> Arguably, MAC [respondent's employer] has assumed fiduciary duties under ERISA in the administration of the MAC Plan. Consistent with *Turrill*, proof of MAC's fiduciary duties under ERISA with respect to UNUM's group insurance policy raises an issue under California law as to the existence of an agency relationship between the employer and the group insurer in light of *Elfstrom*.

(App. 19a-20a (footnote omitted).) As the court observed, "Nothing in *Turrill* even hints that state agency law is somehow preempted by ERISA." (App. 18a.) Indeed, the question of ERISA preemption was apparently entirely overlooked in *Turrill* and is not mentioned in the decision.

The court of appeals in this case, however, squarely addressed the preemption issue. The court began its consideration of § 514(a)'s "relates to" clause with citation to several of this Court's many decisions interpreting that clause, principally *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995) ("*Travelers*"). (App. 20a-21a.) The court then addressed the interaction of preemption and the *Elfstrom* rule and stated:

> ERISA and *Elfstrom* are not anathema. *Elfstrom* does not dictate the benefits to be provided or the manner in which the plan will be administered . . .
>
> As *Turrill* illustrates, the principle that an employer who undertakes responsibilities in

> administering an employee benefit plan assumes fiduciary duties under ERISA meshes smoothly with the *Elfstrom* rule that an employer who assumes such responsibilities in administering a group insurance policy acts as the agent of the insurer.

(App. 21a-22a, citing *Turrill*, 753 F.2d at 1324-25.) Thus, the court concluded:

> In the context of a claim for unpaid benefits under [ERISA] § 502(a), ERISA does not operate to preempt the application of the state law embodied in *Elfstrom* and its progeny to determine the question of timeliness of notice and proof of claim.

(App. 24a.)

The holding of the court of appeals that ERISA does not preempt the *Elfstrom* rule is wrong in several respects. First, the court's conclusion that the *Elfstrom* rule "does not dictate . . . the manner in which the plan will be administered" (App. 21a) is simply mistaken. The plan document at issue in this case provides that a claim is timely only if received by the insurer within a specified deadline. (App. 4a-5a.) The *Elfstrom* rule directly alters this plan term by permitting notice to the employer to substitute for notice to the insurer.

Moreover, the court's observation that the *Elfstrom* rule "meshes smoothly" with ERISA (App. 22a) entirely misses the purpose of ERISA preemption: to establish exclusive federal regulation of employee benefit plans. In *Travelers*, the Court noted that a question of preemption "turn[s] on Congress's intent." 514 U.S. at 655. Unable to glean

congressional intent from "the unhelpful text" of the "relates to" clause, the Court recognized that Congress's intent in enacting § 514(a) was "to establish the regulation of employee welfare benefit plans 'as exclusively a federal concern,'" *id.* at 656, quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981), and "to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *Id.* at 657.

Despite its quotation of this latter passage from *Travelers* (App. 21a), the court of appeals concluded that ERISA and state law could jointly apply to govern claims under employee benefit plans. Exclusive and nationally uniform federal regulation of plans, however, cannot co-exist or "mesh" with state regulation. Rather, to be exclusive, federal regulation must exclude state law.

This Court has repeatedly held that ERISA's preemption is not limited to state laws that conflict with ERISA but extends to the entire field of employee benefit plan regulation. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985). Thus, in *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987), the Court considered whether Mississippi common law causes of action could be applied to provide remedies for a claim involving alleged bad faith processing of benefits under an ERISA plan. Noting that there was "no dispute" that those causes of action related to an ERISA plan, the Court nonetheless reemphasized "that the pre-emption clause is not limited to 'state laws specifically designed to affect employee benefit plans.'" *Id.* at 47-48, quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983). Since the common law causes of action asserted in *Pilot Life* involved "processing of a claim for benefits under

an employee benefit plan," they "undoubtedly meet the criteria for pre-emption under § 514(a)." *Id.* at 48.

The Court's rationale in favor of preemption in *Pilot Life* also requires preemption of the *Elfstrom* rule as applied to a claim for benefits under an ERISA plan.[3] Indeed, the *Elfstrom* rule is even more closely related to an ERISA plan than were the general common law claims held preempted in *Pilot Life*. The *Elfstrom* rule as applied in this case rests its conclusion of agency on the duties imposed by ERISA on an employer that sponsors an employee benefit plan. In *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), the Court held that ERISA preempted a state law claim asserting that an employee had been wrongfully discharged in order to interfere with his rights under an ERISA-covered pension plan. Since "the existence of a pension plan is a critical factor" in the application of the state law, the Court had "no difficulty in concluding" that the state law "relates to" an ERISA plan. *Id.* at 139-40. Likewise, here, the employer's duties under ERISA cannot provide the rationale for application of state law. To the contrary, because the *Elfstrom* rule depends on proof of these ERISA duties, for that reason alone, it relates to the plan within the meaning of § 514(a).

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[3] Likewise, the notice-prejudice rule "relates to" a plan when applied to a claim for ERISA plan benefits. As noted above, the *Cisneros* court did not address whether this rule related to the plan, although it quoted from *Travelers* for the proposition that "[t]he Supreme Court recently has narrowed the scope of ERISA's 'related to' language." *Cisneros*, 134 F.3d at 944 n.3. In *O'Connor v. UNUM Life Insurance Co. of America*, 146 F.3d 959 (D.C. Cir. 1998), which followed *Cisneros* in holding California's notice-prejudice rule not preempted, the parties agreed that the rule related to the ERISA plan. *Id.* at 962.

II. THE CALIFORNIA COMMON LAW RULES ARE NOT SAVED FROM PREEMPTION AS LAWS WHICH REGULATE INSURANCE

Even if a state law relates to an ERISA plan within the meaning of § 514(a), it may still be saved from preemption under § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A), if it is a law "which regulates insurance."[4] Because of its holding that the *Elfstrom* rule did not fall within § 514(a), the court of appeals had no occasion to consider whether that rule fell within this "saving" clause. It expressly followed *Cisneros*, however, to hold that California's notice-prejudice rule was saved from preemption. (App. 5a.)

In reaching this conclusion, the *Cisneros* court referred to *Metropolitan Life*, in which this Court first addressed ERISA's saving clause. 134 F.3d at 944-45. There, the Court held that whether a state law "regulates insurance" should be determined by whether the law fits a "common-sense view" of insurance regulation and by reference to three criteria identified for determining the "business of insurance" under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15. *Metropolitan Life*, 471 U.S. at 740-43, quoting *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982).

The *Cisneros* court first concluded that the notice-prejudice rule fit a "common-sense view" of insurance

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[4] Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

29 U.S.C. § 1144(b)(2)(A).

regulation because it "dictates the terms of the relationship between the insurer and insured" and "is directed specifically at the insurance industry and is applicable only to insurance contracts." 134 F.3d at 945. Although the court correctly cited to *Pilot Life* for the meaning of this "common-sense" test, *Pilot Life* actually supports the contrary view.

In *Pilot Life*, the Court applied *Metropolitan Life* to hold that the Mississippi law of bad faith was *not* a state law that "regulates insurance." The Court recognized that "the Mississippi Supreme Court has identified its law of bad faith with the insurance industry." 481 U.S. at 50. It held, however, that bad faith law did not fit a common sense view of insurance regulation because it was not "specifically directed toward" the insurance industry but had its "roots . . . firmly planted in the general principles of Mississippi tort and contract law." *Id.*

Other than its general quotation from *Pilot Life*, the *Cisneros* court made no attempt to apply *Pilot Life*'s analysis of Mississippi bad faith law to California's notice-prejudice rule. The doctrine underlying this rule—that prejudice must result before a failure to give required notice (or to perform a contractual condition) will work a forfeiture—has its roots in the general principles of California contract law[5] and has been applied across the legal spectrum.[6] California courts

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[5] *See* Restatement (Second) of Contracts § 229 (1979) (stating general principle against disproportionate forfeiture).

[6] *See, e.g., Industrial Asphalt v. Garrett Corp.*, 226 Cal. Rptr. 17 (Cal. Ct. App. 1986) (failure to serve statutory notice of mechanic's lien claim effective to defeat lien where no prejudice resulted); *Conservatorship of Rand*, 57 Cal. Rptr. 2d 119 (Cal. Ct. App. 1996) (failure to give notice of citation to proposed conservatee harmless where no prejudice resulted).

have incorporated the legal maxim that "law abhors a forfeiture" into the State's common law, *Ballard v. MacCallum*, 101 P.2d 692 (Cal. 1940), and the doctrine underlying the notice-prejudice rule, as well as the notice-prejudice rule itself, have sprung from this tenet.[7] Thus, the notice-prejudice rule is not "directed specifically at the insurance industry" as the Ninth Circuit found, *Cisneros*, 134 F.3d at 945, but is merely a specific application of the general principle that disproportionate forfeiture should be avoided in the enforcement of contracts.

The *Cisneros* court also determined that its conclusion that the notice-prejudice rule regulates insurance "holds up when measured against the McCarran-Ferguson factors." *Id.* These factors were described in *Union Labor Life Insurance Co. v. Pireno*, as

> *First*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*,

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[7] *See O'Morrow v. Borad*, 167 P.2d 483, 487 (Cal. 1946) (court may excuse compliance with condition in contract to avoid forfeiture). *See also Aetna Cas. & Surety Co. v. Murphy*, 538 A.2d 219, 221 (Conn. 1988) (quoting Restatement (Second) of Contracts § 229 to justify Connecticut notice-prejudice rule); *Woodmen's Accident Ass'n v. Byers*, 87 N.W. 546, 548 (Neb. 1901) (same as to Nebraska notice-prejudice rule).

> whether the practice is limited to entities within the insurance industry.

458 U.S. at 129 (emphasis in original). The *Cisneros* court conceded that the notice-prejudice rule did *not* satisfy the first McCarran-Ferguson factor, since it "may not have the effect of transferring or spreading the policyholder's risk." 134 F.3d at 945. The court held, however, that "the other two McCarran-Ferguson factors weigh heavily in favor of the conclusion that the notice-prejudice rule 'regulates insurance.'" *Id.* at 946.

The *Cisneros* court's conclusion that the notice-prejudice rule did not meet the first McCarran-Ferguson factor was unquestionably correct since that rule does not transfer or spread policyholder risk. As the court noted, the rule does, in a general sense, affect the risk that the insured will prevail against the insurer, since it permits the insured to prevail even where a claim filing deadline is not met. *Id.* The first McCarran-Ferguson factor, however, refers to an entirely different type of risk, *i.e.*, the fundamental risk that is transferred from insured to insurer by the insurance contract. *See Pireno*, 458 U.S. at 130-31 (the risk-spreading principle concerns the risk of injury that the insurer has contractually agreed to bear for the insured). Thus, although the rule affects the risks of paying claims filed after the policy deadline, it does not spread the risk of disability insurance coverage for which the parties contracted.

Rules or laws that merely affect the administration of an insurance policy, rather than its terms, fail to satisfy the first McCarran-Ferguson factor because they do not affect the

transfer of insurance risk.[8] Accordingly, the Mississippi bad faith law at issue in *Pilot Life*—which, like the notice-prejudice rule, was a common law rule that assisted the insured in a claim against the insurer but did not serve to spread risk—was held not to satisfy the first factor. 481 U.S. at 51. In contrast, in *Metropolitan Life* the Court held that the state law at issue, which mandated inclusion of certain benefits in a group insurance policy, satisfied the first factor because it caused the cost of mental health care to be shared by all policyholders in the state, thus affecting the spread of risk. 471 U.S. at 743.

While the *Cisneros* court correctly concluded that the notice-prejudice rule did not meet the first McCarran-Ferguson factor, it erred in holding both that the rule satisfied the two other factors and that the rule regulated

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[8] *See Tingle v. Pacific Mutual Ins. Co.*, 996 F.2d 105, 108 (5th Cir. 1993) (statute preventing rescission of policy following discovery that incorrect application information was submitted, absent fraud, did not shift policyholder risk, although it spread the legal risks of innocent misrepresentations onto the insurer); *DeBruyne v. Equitable Life Assurance Soc'y of Am.*, 920 F.2d 457, 469 (7th Cir. 1990) (ERISA preempts a New York insurance law prohibiting the misrepresentation of an insurance contract's terms because, among other things, the law does not spread policyholder risk but rather "forces the insurer to bear the legal risks associated with [fraudulent] policy language"); *McMahan v. New England Mutual Life Ins. Co.*, 888 F.2d 426, 429 (6th Cir. 1988) (saving clause does not apply to Kentucky case law requiring courts to interpret ambiguous terms in an insurance contract in favor of the insured because the law did "not effect a spreading or transferring of policyholders' insurance risk, but rather forces the insurer to bear the legal risks associated with ambiguous policy language").

insurance despite its failure to affect the transfer of risk. The core of its error was its conclusion that the notice-prejudice rule, like the mandated benefits law at issue in *Metropolitan Life*, satisfied the second McCarran factor because it "effectively creates a mandatory contract term" and thus affects "an integral part of the policy relationship" between insurer and insured. 134 F.3d at 946-47. Unlike a mandated benefits law, however, the notice-prejudice rule does not alter in any substantive way the terms of insurance coverage. Rather, like the bad faith law at issue in *Pilot Life*, it merely affects the procedures for handling claims under the insurance contract and thus "does not define the terms of the relationship between" those parties. *Pilot Life*, 481 U.S. at 51.

Even if the notice-prejudice rule is interpreted as creating a "mandatory contract term" in the insurance policy,[9] that term—as demonstrated by the rule's failure to satisfy the first McCarran-Ferguson factor—does not serve to spread policyholder's risk, and thus cannot be considered to be a substantive part of the policy relationship between insured and insurer. In *Metropolitan Life*, the Court suggested that "substantive terms" of group-health insurance contracts were those terms that affected specific *coverage* to which the

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[9] The court of appeals was incorrect in finding that the notice-prejudice rule "creates a mandatory contract term." The rule does not mandate anything; an insurer is not required to place a deadline in its policies by which claims must be filed. If it does so, it can specify any deadline it chooses. The notice-prejudice rule simply provides that, whatever the substantive terms of the contract for disability insurance may be, time limitations on claim submissions are valid only under certain conditions.

insured was entitled, for example, continuing coverage for disabled dependents or mandatory coverage of infants at birth. 471 U.S. at 729. In contrast, the practices or laws examined by the Court in *Pilot Life, Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), *Pireno*, and *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453 (1969), did not affect coverage terms and thus were held not to satisfy the second McCarran-Ferguson factor (or its pre-*Pireno* equivalent).[10] Several appellate decisions under ERISA have held that a law affecting a purely administrative contract term cannot be considered an integral part of the policy relationship between the insurer and insured.[11]

If the Ninth Circuit's analysis in *Cisneros* were followed, then virtually any procedural rule affecting an insured employee benefit plan could be saved from preemption as a law which regulates insurance, even though it has no effect

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[10] *See Pilot Life*, 481 U.S. at 51, *Royal Drug*, 440 U.S. at 215-16; *Pireno*, 458 U.S. at 119; *National Securities*, 393 U.S. at 460.

[11] *See Davies v. Centennial Life Ins. Co.*, 128 F.3d 934, 942 (6th Cir. 1997) (Ohio statute which does not affect policyholder risk cannot affect substantive terms of the policy and, thus, fails second McCarran-Ferguson factor); *Kelley v. Sears, Roebuck and Co.*, 882 F.2d 453, 456 (10th Cir. 1989) (Colorado statute which prohibited unfair or deceptive practices in the industry "did not control the substantive terms" of the policy); *Smith v. Jefferson Pilot Life Ins. Co.*, 14 F.3d 562, 570 (11th Cir. 1994) (Georgia statute which required written notice of cancellation of insurance coverage did not affect the substantive terms of the policy or an integral part of the relationship between the insurer and insured).

on the spreading of risk. This result would be contrary to decisions of this Court which state that an "indispensable characteristic of insurance" is the "spreading and underwriting of policyholder's risk." *Royal Drug*, 440 U.S. at 211-12 (following an analysis of the legislative history of the McCarran-Ferguson Act). Because the notice-prejudice rule does not regulate or implicate the "true underwriting of risks, the one earmark of insurance," *Securities and Exch. Comm'n v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65, 73 (1959), it cannot affect the policy relationship of the insured and insurer and thus cannot be a regulation of insurance.

The *Cisneros* court's conclusion that the notice-prejudice rule satisfied the third McCarran-Ferguson factor, that it be limited to entities in the insurance industry, 134 F.3d at 946, merely repeats the error of its earlier conclusion that the rule is directed at the insurance industry. As the Court said in rejecting a similar argument in *Pilot Life*, even if a common law doctrine is "associated with the insurance industry," its common law roots preclude a finding that it is limited to entities in the insurance industry. 481 U.S. at 51.

The *Cisneros* court concluded its discussion of the saving clause with the question "If California's rule does not regulate insurance, what does it regulate?" 134 F.3d at 946. Like many rhetorical questions, this one has a straightforward answer that the rhetoric obscures. What the notice-prejudice and *Elfstrom* rules regulate are the administration of the policy. When that policy provides benefits under an ERISA plan, the rules function as a "regulation of an ERISA plan" that is preempted by ERISA. *Travelers*, 514 U.S. at 659. While the *Cisneros* court found "unconvincing" the

notion that Congress could have intended to save from preemption state regulation of the terms of an insurance contract, while preempting procedural rules affecting administration of that contract, 134 F.3d at 946-47, that is exactly what ERISA provides. As the Court held in *Metropolitan Life*, the states remain free to regulate the substantive terms of insurance contracts. 471 U.S. at 736. As *Pilot Life* holds, however, common law rules that merely affect the procedures for handling claims for benefits are not laws which regulate insurance and are not saved from preemption. 481 U.S. at 50-51.[12]

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[12] Although the court of appeals did not reach the issue of whether the *Elfstrom* rule is saved from preemption, the analysis above demonstrates that it clearly is not a regulation of insurance under the *Metropolitan Life* test and thus is not saved from ERISA's preemptive reach. As the California Supreme Court noted, the *Elfstrom* rule is an application of common law agency rules that are incorporated into California law in other contexts. 432 P.2d at 738. Like the notice-prejudice rule, therefore, the *Elfstrom* rule is merely a specific application of a general principle of law—specifically, that one acting on behalf of another and for the benefit of another is the other's agent. Also like the notice-prejudice rule, the *Elfstrom* rule does not spread or even address the risk transferred between insured and insurer. Rather, it merely affects administrative procedures for handling claims. Thus, the *Elfstrom* rule fails the common-sense test as well as each of the McCarran-Ferguson factors and, accordingly, is not a regulation of insurance.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge that the Court reverse the decision of the Court of Appeals.

Respectfully submitted,

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